

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA FREE STATE DIVISION,
BLOEMFONTEIN**

02/2023

THE STATE

v

T K

T M

JUDGMENT

INTRODUCTION

[1] M K and M (hereinafter referred to as the accused) are both adult males and Lesotho nationals. They are legally represented herein by Mr Thipe and are arraigned in this court on numerous charges. I shall momentarily revert to same.

[2] The state is herein represented by Mr Mpemvane.

THE CHARGES

[3] The charges as preferred by the State are fully expounded on in the indictment, I shall therefore, for purposes of this judgment and for brevity's sake, only concisely refer thereto. They are as follows;

Ad Count 1:

Murder read with the provisions of section 51(1) PART 1 of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997(Criminal Law Amendment Act) in that on the 21st November 2021 at Somerspos, Sasolburg the accused unlawfully and intentionally killed Mr Zilungele Damoyi an adult male person (hereinafter deceased 2). The state alleges that in the commission of the aforesaid offence the accused acted with premeditation and /or with common purpose and/or that the death of deceased 2 was caused by the accused whilst committing robbery with aggravating circumstances.

Ad Count 2:

Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51/1977 (the Act) read with the provisions of section 51 (2) of the Criminal Law Amendment Act in that on the aforesaid date and at Somerspos the accused unlawfully and intentionally inflicted grievous bodily harm on deceased 2 by shooting him with a firearm and that before, during or after, and with intent to steal took his property to wit, his firearm, cellular phone, clothing and cash.

Ad Count 4:

Robbery read with the relevant provisions of the Criminal Procedure Act and further read the relevant provisions of the Criminal Law Amendment Act in that on the aforesaid date and at Somerspos the accused unlawfully and intentionally inflicted grievous bodily harm on Mr Reabetswe Chabedi (Chabedi) by assaulting him with a firearm and that before, during or after, and with intent to steal took his property to wit, his cellular phone and cash.

Ad Count 5:

Murder read with the relevant provisions of the Criminal Procedure Act and further read the relevant provisions of the Criminal Law Amendment Act in that on the 18th November 2021 at Zamdela, Sasolburg the accused unlawfully and intentionally killed Mr Petrus Lefu an adult male person (hereinafter deceased 1). The state alleges that in the commission of the aforesaid offence the accused acted with premeditation and /or with common purpose and/or that the death of deceased 1 was caused by the accused whilst committing robbery with aggravating circumstances using a firearm.

Ad Count 6:

Robbery read with the relevant provisions of the Criminal Procedure Act and further read the relevant provisions of the Criminal Law Amendment Act in that on the aforesaid date and at Zamdela the accused unlawfully and intentionally inflicted grievous bodily harm on deceased 1 by shooting him with a firearm and that before, during and or after, and with intent to steal took his property to wit, his cellular phone, shoes, cigarettes and an accordion.

Ad count 7:

That on the aforesaid date and at Zamdela the accused unlawfully and intentionally stole Mr Pule Mohokare's cellular phone.

Ad Count 9:

The state alleges that the accused contravened the provisions of section 90 read with the provisions of sections 1, 103, 117, 120 (1) (a) and 121 further read with schedule 4 of the Firearms Control Act, Act 60/2000 in that on the 18th November 2021 at Zamdela they unlawfully had in their possession ammunition to wit two 9mm parabellum rounds without being the holders of licenses and or permits entitling them to such possession.

Ad Count 10:

Lastly, it is alleged that the accused contravened the provisions of section 49(1) (a) of the Immigration Act, Act 13 of 2002 in that between the 18th and 24th November 2021 they unlawfully entered and remained in the Republic of South Africa without valid permits or visas.

THE PLEA AND PLEA EXPLANATIONS

- [4] The accused were prior to plea proceedings apprised of the provisions of the Criminal Law Amendment Act as it pertains to the minimum sentences applicable consequent to a guilty finding. Having confirmed that they understood same, they tendered pleas of not guilty on counts 1, 2, 4, 5, 6, 7 and 9 and elected to proffer no plea explanations.
- [5] In respect of count 10 they tendered pleas of guilty and admitted all the material elements of the said offence. In addition to admitting the material elements of the offence as per the indictment, accused 1 admitted to intentionally and unlawfully entering the RSA illegally on the 16th June 2021 and remaining within her borders illegally. Accused 2 admitted to lawfully entering the Republic in 2017 with a valid permit which permit expired in 2018. Upon expiry of said permit, he admitted to knowingly and unlawfully remaining within the borders of the Republic.

EXHIBITS

- [6] The following Exhibits were by consent admitted into the record;
- (a) Exhibit A: The section 212 B of the CPA notice of undisputed facts. Despite not filing a written response to the section 212 B statement as required and initially disputing the facts as stated therein, the accused, mid-trial, admitted most of the facts stated therein. The only facts they disputed were those pertaining to the holding of the identity parade as well as the fact that deceased 1 was shot at, robbed and died in his house. The rationale for this escapes me, as will be seen later on in this judgment, this fact too could have been

admitted, regard being had to the versions as advanced by the accused.

- (b) Exhibit B: the medico-legal report in respect of deceased 2 indicating that he died on the 21st November 2021 as a result of a gunshot wound.
- (c) Exhibit C: A photo album of the scene at Somerspos Zamdela as compiled by warrant officer Majara.
- (d) Exhibit D: the medico-legal report in respect of deceased 1 indicating that he died on the 18th November 2021 as a result of a gunshot wound.
- (e) Exhibit E: A photo album of the scene at Harry Gwala Zamdela as compiled by sergeant Thobeha.
- (f) Exhibit F: the photo album in respect of the identity parade line up.
- (g) Exhibit H: the ballistic report in terms of section 212 of the CPA indicating that the cartridges submitted for analysis are that of 9mm parabellum caliber and were manufactured or designed to be fired by a centre-fire firearm.
- (h) Exhibit I: The identification parade form
- (i) Exhibit J: a section 212(3) CPA affidavit compiled by Mr Mojalefa Isaac Mautse (Mautse) an officer in the Department of Home Affairs indicating that Mr K is illegally in the Republic of South Africa.
- (j) Exhibit K: a section 212(3) CPA affidavit compiled by Mr Mautse indicating that Mr M is illegally in the Republic of South Africa.

ADMISSIONS AND UNDISPUTED FACTS

[7] The aforementioned admissions and exhibits considerably delineated the issues between the parties and rendered the following facts common cause;

- (a) The identity, time, and cause of death of the deceased in both counts, as well as the fact that both the deceased sustained no further injuries from whence they were transported from the respective scenes until they each landed on the post mortem table.
- (b) The 2 live rounds tested indeed are ammunition manufactured or designed to be fired by a centre-fire firearm.
- (c) That an identity parade was held and that accused 1 and 2 were thereat pointed out.
- (d) The contents, correctness and chain of custody in respect of the key and photo albums in respect of both scenes.
- (e) That deceased 2 was the owner of a tuck-shop and that he was, whilst working in his shop assaulted and robbed of his cellular phone, cash and clothes and that he died at the scene.
- (f) That Reabetswe Chabedi was assaulted and robbed of his cellular phone.

FACTUAL MATRIX

Summary of evidence for the state

[8] In order to make sense of the factual matrix in this case I shall deal therewith according to the chronology of events rather than the chronology of the charges as put to the accused.

Pule Mohokare (Mohokare)

[9] Mr Mohokare and deceased 1 albeit not related to each other, knew each other since 2017 and shared a father and son relationship. Mr Mohokare would often

visit deceased 1, break bread with and perform some errands for him. Deceased 1 would, in turn, financially assist Mohokare whenever the need arose.

[10] On the evening of the 18th November 2021, as per usual, he was at deceased 1's place of residence. As per usual, they broke bread. After the meal, Mohokare went out to buy himself a cigarette, leaving deceased 1 behind and his Huawei P8 Lite cellular phone charging in the house. Not long after he returned and upon his return and entry into the yard, he saw an unknown person by the window. He could not identify this person as it was dark where the latter stood. This person summarily asked him who he was and instead of responding Mohokare retreated.

[11] Whilst observing this person from his vantage point by the tree and meters from the house, he saw 2 males exiting and running from the house. As they were running out, he heard gun-shots being fired. He identified the 2 males as the accused before this court. He testified that he knew them well as they resided together in a room in the deceased's yard as tenants and they would often all make small talk. Accused 1 resided there for about a month and accused 2 for approximately 2 weeks. The latter moving out earlier than accused 1. He knew accused 1 as Lehlanya and could not remember accused number 2's name, he maintained that, that notwithstanding, he knew accused 2 well as the latter would often visit accused 1 even after he vacated the rental property.

[12] As the accused exited the house running and shooting, he saw and identified them by their faces and body built. He described accused 1 as slim and accused 2 as short. He was aided in seeing and thus identifying them by the light emanating from the house as the door was open. He could however not discern who of the 2 had the firearm and was firing therewith.

[13] When he heard the gun shots, he ran to a certain yard whereat he borrowed a phone and called the police. When the police arrived he explained what he saw and told them who the assailants were and that they could be found in town where they sold traditional medicine. He realised that his Huawei P8 Lite cellular

phone was missing from whence he left it charging. He also found that the deceased's accordion, Nokia cellular phone and some other items were missing.

[14] During the course of the investigation, the police took him to town in search of the assailants but they could not locate them.

[15] He testified that his phone was recovered and handed to him by the police. He identified it as his by its brand name, missing back cover and the screen that had an ink leakage.

[16] After the assailants were apprehended the police brought them to his home. The purpose of this exercise, so he testified, was so that the police could confirm that the persons they apprehended were the correct suspects. He identified both the assailants brought as the persons he saw running and shooting at the deceased's home. Subsequent to this visit, he was later requested to attend an identification parade. At the said parade he pointed both the accused out.

[17] This was the sum total of his evidence.

CROSS EXAMINATION

[18] The accused did not dispute that at some point they resided as tenants at the deceased's. They also did not dispute knowing Mohokare or interacting with him. In fact they did not dispute much of the evidence of Mohokare, save to deny being at the scene at the date and time he alleged and putting their versions to him, much of his evidence remained uncontroverted.

[19] Mohokare was further taken on a tangent with regards to how he identified the assailants, whether he observed any unique features and or characteristics and so forth. The rationale to this line of questioning escaped me, still does, regard being had to the admission that the accused and Mohokare were all well known to each other.

[20] It was further put to Mohokare that the reason why he pointed the accused out at the identity parade is because the police took them to him prior to said identity

parade. Through all the grilling about identification, Mohokare maintained that he knew the accused and was not mistaken in his identification of them.

Sgt Majoe (Majoe)

- [21] An experienced police officer with some 16 years of service, he testified that he was part of a task team tasked with investigating the events of the 18th November 2021. On even date, he attended the scene in Harry Gwala Zamdela whereat he found deceased 1 who had been shot. During the course of the investigation, the investigating team received information from Mohokare relating to the identity of the assailants. Upon following up on said information, they found the 2 accused at their place of residence. There he observed that the accused's bags were packed and it appeared that they were about to leave.
- [22] Upon introducing themselves and the purpose for their visit, they requested to search the accused and requested each to hold their respective bag(s), the latter acquiesced. He searched accused 1 and found 1 black Samsung cellular phone on his person and in his pocket he found a blue Huawei cellular phone that had no back cover and its screen was damaged and appeared to be leaking ink. He also observed many other cellular phones on the table. Thereafter the 2 accused who were still in the house, were arrested. As he did not know the accused prior to their arrest, they were taken to Mohokare in order for the latter to confirm their identities. Mohokare indeed identified the accused and also identified the Huawei recovered as his phone.
- [23] The Samsung phone was identified as that of deceased 2 with the aid of its IMEI number. He testified that the IMEI number found on the phone box brought by the deceased's son and that appearing on the Samsung phone recovered from accused 1 matched. Said IMEI number was 351737053658292.
- [24] He testified that the 2 live ammunition rounds found in accused 1's possession were placed in Exhibit bag P2B000756513 and booked into SAP 13-970/2021.
- [25] This was the sum total of his evidence.

CROSS EXAMINATION

- [26] For reasons which shall become evident later on in this judgment, I deem it prudent to extensively deal with the cross examination of Majoe.
- [27] During cross examination, both denied residing together at the time of their arrest, in essence even denying being arrested at the same place and time. Accused 1 disavowed that any phones and live ammunition rounds were found in his possession. Majoe refuted this and maintained his version in chief. Accused 1 in essence disavowed any knowledge of and involvement in the offences as alleged.
- [28] Accused 2 charged that he was arrested whilst minding his own business in the street and whilst in the company of one Charoane, also a Lesotho national. In fact he charged that at the time of his arrest, in the street, the police enquired about his documents, which he could not produce, and whether he knew where other Lesotho nationals resided. Hereafter both he and Charoane were taken to accused 1's place of residence whereat they found him in the company of one Seabata. It is only at this point that they were all searched. This Majoe refuted *in toto* and maintained that both the accused were found, searched and arrested together in the house they resided in.
- [29] Subsequent to nothing being found in his person, the police took him to his place of residence whereat they found his girlfriend. His residence was searched and that search too yielded nothing. He was then taken back to accused 1's residence from where they were both taken to Mohokare's for purposes of identification. Subsequent to this they were then taken to a desolate place and assaulted by Majoe and his colleagues. This too Majoe refuted. After the assault they were taken back to accused 1's place of residence where another search of the property again yielded no results. He too in essence disavowed any knowledge of and involvement in the offences as alleged.

[30] Save to put their respective versions to Majoe and accused 2 revealing an alibi in the form of his girlfriend, nothing much turned on the cross examination.

Reabetswe Chabedi (Chabedi)

[31] Chabedi testified that deceased 2 was his father's elder brother and that the latter owned and operated a tuck shop in Somerspos. Throughout his evidence, he referred to deceased 2 as his grandfather, thereby paying homage to the close-knit bond they shared.

[32] On the evening of the 21st November 2021 he made his way to the tuck shop. Upon arrival there he observed 3 males who after they bought cigarettes stood aside and appeared to count money. Upon seeing him, deceased 2, who at that stage was behind the counter, opened the shop for him to enter. Unfortunately before he could enter, 1 of the 3 males, who he identified as accused 2, swatted him aside. When he enquired what the latter was doing, he was met with expletives and accused 2 summarily pulled out a gun. Whilst wielding the gun he forcefully pushed Chabedi into the shop and frog marched him and his grandfather to where the cash register was located. Accused 2, still wielding a gun, followed them to the part of the shop where the cash register was located, the other 2 males remained at the front rummaging through the refrigerators.

[33] Still wielding the firearm, accused 2 took Chabedi's phone from his back pocket and demanded the deceased's phone, the latter obliged and handed his Samsung phone over. Still wielding the gun accused 2 asked where the money was kept, upon being met with silence, he hit the deceased on the head with the firearm. The deceased as a result of the blow bled profusely and indicated where the money was kept where after accused 2 took it. Another of the assailants who by now also pointed a firearm at his grandfather, fired a shot which hit his grandfather in the chest.

- [34] He testified that he managed to identify accused 2 by his face as it was not covered and the area was well illuminated as all the lights in the shop were on. Furthermore throughout their ordeal he stood in close proximity to accused 2.
- [35] He testified that he is aware that his grandfather's phone was later recovered but his was never recovered.
- [36] A while after this ordeal, he was requested to attend an identity parade. At said parade he failed to identify any of the assailants. When prompted for an explanation by Mr Mpemvane, he proffered that at the time of the identity parade he was frightened and still traumatized. He was however certain when he identified accused 2 here in court that he was indeed at the scene and that he wielded the firearm at him and hit his grandfather therewith.

CROSS EXAMINATION

- [37] As to be expected Chabedi was cross examined at length regarding how he identified accused 2 in his written statement and during his *viva voce* evidence. Chabedi however stood his ground and maintained his version in chief.

Ntando Damoyi (Damoyi)

- [38] He testified that he is deceased 2's son and was requested by the police to identify the Samsung phone recovered. He took the phone box whereon the IMEI number was written to the police station. Upon arrival at the police station the IMEI number on the box was compared with that on the Samsung phone and same were found to match. The IMEI number was 351737/05/365829. That is how the recovered phone was identified as his father's.
- [39] It came as no surprise that Damoyi was not subjected to cross examination. Therefore, his evidence with regards to how his father's phone was identified remained uncontroverted.

Andries de Jager (W/O de Jager)

- [40] W/O de Jager testified that he is the investigating officer in the murder of deceased 2. In the course of his investigation he was handed 2 live rounds of ammunition which he bagged and booked into SAP 13 with serial number 968/2022. He subsequently booked same out and sent it under receipt number P2B000756513 to the forensic laboratory for ballistic tests to be conducted. A report indicating that the 2 live rounds were indeed ammunition as defined in the Firearms Control Act was received.
- [41] It too came as no surprise that De Jager was not subjected to cross examination. His evidence therefore remains uncontroverted.

Christelene v/d Linde (Sgt v/d Linde)

- [42] Sgt v/d Linde an officer with 14 years' experience attached to the Sasolburg detective unit testified that she was not at all involved with the investigation into the cases at hand, but was only tasked with the the identity parade. Both accused as well as Mohokare were prior to the parade persons unknown to her. She was, throughout the process, assisted by W/O Morabe who acted as a SeSotho interpreter. She did this, so she testified, in order to ensure that the accused followed and understood the process. Prior to conducting the identity parade she, through the interpreter, explained the process to the accused and also explained their rights with regards to legal representation. They both confirmed understanding same and indicated that they elected not to have a legal representative present during the identity parade.
- [43] She detailed the process followed; that she lined up 15 males with similar description and features to the accused. Accused 1 was positioned 10th and held the number 10. Accused 2 was positioned 4th and held the number 4. Mohokare pointed out both the accused and informed her during said pointing out that both were present during shooting on the 18th November 2021.
- [44] In cross examination the accused disputed that their rights to legal representation were prior to the parade explained to them. They further disavowed any use of

any interpreter during such process. In fact they took it a step further and disavowed any form of discussion between v/d Linde and themselves and averred that they were instead subjected to the parade without so much as an explanation. In essence thereby attacking the process followed. De Jager rejected these statements *in toto* and maintained her version in chief.

Mohlalefe Morabe (W/O Morabe)

[45] Morabe briefly testified and supported the version of v/d Linde that he acted as an interpreter, interpreting from English to SeSotho, the latter being the language spoken by both accused spoke and also his own mother tongue. During said interpretation, he was satisfied that the accused understood him as none indicated the contrary.

[46] Save to deny that Morabe assisted as an interpreter nothing turned on his cross examination.

[47] This was the sum total of the state's case.

Summary of evidence for the defence

Accused 1

[48] His version concisely is that he is Lesotho national. He knew deceased 1 as Skoppo and that the latter was at some point his landlord for approximately a month. He testified that accused 2 is known to him as they are from the same village in Lesotho. He disavowed any involvement in the murder of deceased 1 and testified that on the 18th November 2021 he went to Vereeniging and upon his return in the evening, he remained at his place of residence in Harry Gwala. He also disavowed any knowledge of and involvement in the murder of deceased 2 on the 21st November 2021 and proffered that even on this date he was at his home. He maintained that deceased 2 was a person unknown to him and that he had never set foot in Somerspos and did not even know said locality. He denied sharing a residence with accused 2 at the time of their arrest and in essence

denied that prior to his arrest any stolen items and ammunition were found in his possession.

[49] The central theme of his entire evidence was a bare denial of all the allegations levelled against him. In order to bolster his evidence with regards to his place of residence and whereabouts during the period of the murders and robberies, he intimated under oath that he would call his landlady as a witness. This however turned to naught as he closed his case after testifying without having called any other witnesses.

CROSS EXAMINATION

[50] Accused 1 was subjected to lengthy cross examination which amongst others confirmed that he, accused 2 and deceased 1 were all well known to each other. The central theme of bare denial continued even in his cross examination.

[51] This was the sum total of the case as mounted by accused 1.

Accuse 2

[52] Accused 2's version was equally brief and also amounted to a bare denial. He too disavowed any involvement in and knowledge of any of the robberies and murders he is charged with. On both occasions he testified that he was at home with his live-in partner. He testified that the events of the 18th November 2021 are etched in his memory as he had a terrible flu which rendered him unable to work for some 2 weeks. Equally the events of the 21st November 2021 are etched in his memory as he was at home with his live-partner. He too maintained that deceased 2 was a person unknown to him and that he had never set foot in Somerspos and did not even know that locality. Needless to say, the central theme to his version too, was a bare denial.

[53] His cross examination did not reveal anything earth-shattering, it was the same humdrum repetition of the bare denial he proffered during his version in chief. It is worth mentioning that albeit Majoe was confronted with the alleged assault,

nothing of the sort was mentioned by accused 2 in his version in chief or during cross examination.

Mampe Motshoeneng (Ms Motshoeneng)

[54] Ms Motshoeneng testified that she and accused 2 are live in partners. She vividly remembers that on both the dates in question accused 2 was at home with her. This she knew because he was always at work and when not at work he would be with her as “he is not someone who likes going around”. She further vividly remembered that specifically on the 18th November 2021 accused 2 was at home as he had a terrible flu.

[55] Her evidence was further that on the day accused 2 was arrested she was present as he was arrested at their home. It is her emphatic evidence that except for the police, only she and accused 2 were present at their home during said arrest.

[56] As emphatic as her evidence in chief was, the wheels literally came off during cross examination. Towards the tail-end of her cross examination, it was clear for all to see that Ms Motshoeneng was less than candid in her evidence in chief. It was clear to see that she came to court with one purpose and one purpose only, to manufacture an alibi and thereby protect her lover, a miscalculation of Herculean proportions I daresay. At this stage already, I absolutely have no quibble in rejecting this alibi as patently and palpably false. Even Mr Thipe conceded as much during arguments. I would be remiss however if I do not remark about and express my disquiet at the conduct of Motshoeneng. Albeit I do not know her age, she is evidently not a young lady anymore, one would expect of a lady of such advanced age to have a congenial relationship with the truth, but alas!

LEGAL ISSUE

[57] The exposition of the facts above, the exhibits admitted into the record by consent as well as the admissions made by the accused as already alluded to

above, rendered most of the issues common cause. The only issue that remains for decision by this court is the identity of the assailant and or assailants. The state submitted that I find that the accused are culpable for the death of the deceased as well as for the robberies. The state has however conceded that they did not pass muster with regards to count 9 in respect of accused 2 and implored the court to acquit him in that regard. I agree.

[58] The defence in turn, as to be expected, argued for the acquittal of the accused on all counts except count 10 to which they pleaded guilty to.

THE LAW

[59] It needs no restating that the onus to prove the guilt of an accused beyond any reasonable doubt rests with the state and the corollary thereof is that the accused bears no such onus. The accused can simply elect to remain silent and not proffer any explanation. If however an accused proffers an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

[60] Equally needing no restating is the observation by the court in **S v Shackell 2001 (2) SACR 185 (SCA)** that in view of the standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. The court further held that it is permissible to test the accused's version against the inherent probabilities. But his version cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

EVALUATION OF THE EVIDENCE

The events of the 18th November 2021

- [61] In order to arrive at the conclusion whether the state has successfully discharged its onus, the whole mosaic of evidence must be considered, in this regard see **S v Van der Meyden 1999 (2) SA 79 (W)** where the court cited with approval **S v Van Aswegen 2001 (2) SACR 97 (SCA)**. The court further held that “just as the court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possibly be true”.
- [62] A careful consideration of the factual matrix in this case reveals that the state’s case in respect of both the events of the 18th and 21st November 2021, insofar as the identity of the assailant(s) is concerned, rests on single witnesses. Chabedi and Mohokare. Their evidence stands to be treated with caution on another score as well; both are identifying witnesses. On count 1 only Chabedi identified and placed accused 2 at the scene. On count 5, equally, only Mohokare placed both the accused at the scene.
- [63] It is settled law that a conviction can follow even on the evidence of a single competent witness provided same is trustworthy and satisfactory in all material respects see the *locus classicus* **R v Mokoena 1932 OPD 79**.
- [64] In **S v Sauls and Another 1981 (3) SA 172 (A)** the court held as follows: “There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”
- [65] With regards to identification the court in **S v Mthethwa 1972 (3) SA 766(A)**, another *locus classicus*, held that ‘because of the fallibility of human observation, evidence of identification is approached by our courts with some caution. The court held that it was not enough that the witness is honest, the reliability of the witnesses observation, must also be tested.

[66] *In casu*, in respect of the events leading up to and including the death of deceased 1, this court is dealing with 2 accused persons who are both well known to Mohokare. So well-known are they that he identified accused 1 by his name, Lehlanya. Prior to the 18th November 2021, he had numerous and frequent opportunities of observation. Even on that fateful evening, the lights in the house were on and provided sufficient illumination for him to see and observe the goings on from his vantage point. Not only did he testify to just seeing the faces of accused 1 and 2, he managed to observe that they came out of the house running whilst firing shots. I hasten to add that I am alive to the fact that despite his prior knowledge of the accused, on the evening in question, the scene of observation was mobile and he no doubt must have been frightened. That notwithstanding, I harbour no doubt in my mind that Mohokare was not mistaken in his identification of the accused, not at the scene and certainly not during the identity parade. I am fortified in this finding by the fact that despite their denials, it is an inescapable fact that accused 1 was, days after the killing of deceased 1, found in possession of not only a cellular phone belonging to Mohokare but also 2 live rounds of ammunition. With the benefit of the doctrine of recent possession and inferential reasoning as well as the absence of any other gainsaying evidence, what other inference can this court draw? For the court in **Mothwa v The State (124/15) [2015] ZASCA 143 (1 October 2015)** restated the law relating to the doctrine of recent possession thus;

The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person.

- [67] This is a quintessential case where the proven facts are consistent with the inference sought to be drawn. Not only that, this is a quintessential case where the exercise of caution must certainly not displace common sense, and common sense under these circumstances, dictate that Mohokare is not mistaken, he knows both accused and they too agree to knowing him.
- [68] In this regard this court refers to the case of **R v Dladla 1962 (1) SA 307 (A) at 310C-E** wherein Holmes JA, referred with approval to the remarks by James J –“that one of the factors which in our view is of greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased”. More recently the SCA in **Machi v S (256/2020) [2021] ZASCA 106 (30 July 2021)** held that in these circumstances there is no room for mistaken identity.
- [69] Additionally, Mohokare’s version also does not stand alone, it finds corroboration in the version as advanced by Majoe. It further finds corroboration in the improbability and indeed the mendacity of the versions as advanced by the accused. I find it decidedly improbable that both accused remembered their whereabouts on the 18th November 2021 in the minutest of details. What made this day stand out to them? Surely until the police came knocking at their door, on their versions, they could not have known that deceased 1 was murdered. Furthermore, perhaps the greatest pointer of improbability of the accused’s versions and mendacity is their respective attempts to manufacture alibi’s, both which fell flat, as well as the attempt to cast Majoe and his crew in less than favourable light. I waited with bated breath for the version as put to Majoe that they were assaulted to emerge during their evidence in chief. Needless to say I had a better chance of seeing pigs fly. This too points to their mendacity and the improbability of their respective versions.
- [70] Applying the same wisdom of inferential reasoning as set out in **R v Blom 1939 AD 188**, accused 2 was positively identified by Mohokare at the scene as well

during the identity parade, he was arrested in the company of accused 1 who at the time was found in possession of Mohokare's phone stolen at the scene of the murder, his alibi witness completely fell flat and was proved to have a less than economical relationship with the truth. Once more under these circumstances, what other inference can the court draw other than that albeit nothing was found in his possession, he too by reason of his active association at the scene, he too is culpable in the death of deceased 1 and the robbery that ensued prior, during or after the death of deceased 1. It is correct as submitted by the State that it matters not who pulled the trigger and who physically stole the property, what is cardinal is the conduct of the accused during the commission of the offences and their active association. The court in **S v Mgedezi and Others 1989 (1) SA 705 (A)** outlined the following requirements for active association in common purpose. The accused must have:

- (a) been present at the scene where the violence was committed;
- (b) been aware of the assault on the victim by somebody else;
- (c) intended to make common purpose with the person perpetrating the assault; (d) manifested his sharing of a common purpose by himself performing an act of association with the conduct of the perpetrator; and
- (e) have the requisite *mens rea*. *Dolus eventualis* is sufficient: the accused must have foreseen the possibility that the acts of the perpetrator may result in the death of the victim, and reconciled himself with that eventuality.

[71] I hold the considered view that even in the present case all the aforementioned prerequisites have been met. Both were at the scene, both were aware that there was a firearm, both intended to make common purpose with the other as evinced by their action of running from the scene and ultimately being found together. It matters not that the State did not prove prior agreement between them, same is inferred from their active association with each other. In **Govender v The State**

(221/2022) [2023] ZASCA 60 (3 May 2023) there was no evidence of a prior agreement between Accused 1 and the appellant to murder the deceased. The court held that a finding that a person acted together with another in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of the participants. The State was therefore required to prove that the appellant had actively associated himself with the execution of the common purpose. The concept of active association is wider than that of agreement, since it is seldom possible to prove a prior agreement. Consequently, it is easier to draw an inference that a participant associated himself with the perpetrator.

[72] In the result I have no quibble in finding that in respect of the events of the 18th November 2021, Mohokare as the identifying witness was not only credible but also a reliable witness and that the State passed muster of the onus which rested on them and that in respect of the events of the 18th November 2021 the versions as advanced by the accused stand to be rejected as false.

The events of the 21st November 2021

[73] The exposition of the law with regards to identification, single witness, alibi, common purpose, applies *mutatis mutandis* here as well, consequently in an endeavour not to overburden this judgment any more than I have I shall not repeat same, save to mention that here too I have applied the necessary caution in evaluating the evidence of Chabedi.

[74] I do not for a second believe that Chabedi was not an honest witness. He after all did not hide the fact that at the identity parade he did not identify any of the assailants who were at the shop, notwithstanding his evidence here in court that he had a good look at accused 2 in a well illuminated confined area. I accept that at the time he partook in the identity parade the trauma was still fresh in his mind and that may account for his inability to identify the assailants. I accept that, his dock identification of accused 2 notwithstanding, with the benefit and clarity afforded by time, he managed to make a positive identification. It is his evidence

after all that the incident played itself over and over in his mind. I am furthermore fortified in this finding by the fact that Chabedi did not embellish anything, he told it as he experienced it. He could very easily have placed all the blame on accused 2, instead all he implicates him in is the robbery and hitting his grandfather with the firearm. He testified that someone else fired the fatal shot. These are the hallmarks of an honest witness.

[75] In any event even if it could somehow be successfully argued that I misdirected myself in this regard, there remains the following uncontroverted and proven facts; the person Chabedi saw at his grandfather's shop was found, mere days after, in the company of accused 1, who was found to have had in his possession deceased 2's phone. The miniscule lapse of time between this incident and the recovery of the phone, the interconnectedness of this incident and that of the 18th November 2021 and the circumstances under which accused 2 was arrested and naturally his absolutely and palpably false and manufactured alibi, lead this court to but one inescapable and only inference. To find otherwise would certainly be allowing the exercise of caution to displace common sense.

[76] I further draw wisdom from the following decision of Musi AJP, as he then was, In **Langeberg v The State (A221/2016) delivered on the 16 March 2017** wherein he cited with approval **S v Janse van Rensburg 2009 (2) SACR 261 (C)** wherein the court held that "logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of such witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the state has mustered the requisite threshold-in this case proof beyond a reasonable doubt".

[77] Having done that I have no quibble in finding that all the witnesses presented by the state to this court were not only honest, they were reliable as well. Consequently, here too I have no quibble in finding that in respect of the events of the 21st November 2021, the State passed muster of the onus which rested on them and that in respect of these events too, the versions as advanced by the accused stand to be rejected as false.

FACTUAL FINDINGS

[78] I accordingly make the following factual findings in respect of the disputed facts;

- (a) The accused acting in common purpose caused the death of deceased 2 by shooting him with a firearm and robbed him of his belongings including a cellphone and cash prior to, during or after killing him.
- (b) That on even date the accused acting in common purpose the accused robbed Chabedi's phone whilst shoving him and wielding a firearm.
- (c) The accused acting in common purpose caused the death of deceased 1 by shooting him with a firearm and robbed him of his belongings prior to, during or after killing him.
- (d) The accused whilst acting in common purpose stole Mohokare's cellular phone.
- (e) That accused 1 was in unlawfully possession of 2 9mm parabellum rounds.

[79] Resultantly;

Ad count 1:

Both are convicted of Murder read with the provisions of section 51(1) PART 1 of Schedule 2 of the Criminal Law Amendment Act.

Ad Count 2:

Both are convicted of Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51/1977 (the Act) read with the provisions of section 51 (2) of the Criminal Law Amendment Act.

Ad Count 4:

Both are convicted of Robbery with the relevant provisions of the Criminal Procedure Act and further read the relevant provisions of the Criminal Law Amendment Act.

Ad Count 5:

Both are convicted of Murder read with the relevant provisions of the Criminal Procedure Act and further read the relevant provisions of the Criminal Law Amendment Act.

Ad Count 6:

Both are convicted of Robbery read with the relevant provisions of the Criminal Procedure Act and further read the relevant provisions of the Criminal Law Amendment Act.

Ad count 7:

Both are convicted of Theft

Ad Count 9:

Accused 1 is convicted of contravening the provisions of section 90 read with the provisions of sections 1, 103, 117, 120(1) (a) and 121 further read with schedule 4 of the Firearms Control Act, Act 60/2000.

Accused 2 is acquitted on the aforesaid charge.

Ad Count 10:

Both are convicted of contravening the provisions of section 49(1) (a) of the Immigration Act, Act 13 of 2002.

NG Gusha: AJ

For the State:

As instructed by:

For the Accuses:

Instructed by:

Adv. L.B. Mpemvane

Director of Public Prosecutions, Bloemfontein

Mr K Thipe

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